

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
IVAN COLE,)
)
Appellant,)
)
v.)
)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
)
Respondent.)

PCHB No. 957

FINAL ORDER GRANTING
MOTION TO DISMISS

On September 1, 1976, a Motion for Dismissal for Lack of Subject Matter Jurisdiction was filed by Respondent Department of Ecology with the Pollution Control Hearings Board in PCHB No. 957. Appellant Ivan Cole appeared through his attorney, Lawrence L. Tracy, and Respondent Washington State Department of Ecology appeared through its Assistant Attorney General, Joseph J. McGoran.

By stipulation of the parties this Motion was considered by the Board on the basis of written memoranda submitted in lieu of oral argument.

1 The Board having reviewed the pleadings and memoranda submitted
2 by the parties, and having entered on the 5th day of October, 1976, its
3 proposed Order Granting Motion to Dismiss; and the Board having served
4 said proposed Order Granting Motion to Dismiss upon all parties herein
5 by certified mail, return receipt requested and twenty days having
6 elapsed from said service; and

7 The Board having received no exceptions to said proposed Order
8 Granting Motion to Dismiss; and the Board being fully advised in the
9 premises; now therefore,

10 IT IS HEREBY ORDERED, ADJUDGED AND DECREED tht said proposed
11 Order Granting Motion to Dismiss, dated the 5th day of October, 1976,
12 and incorporated by reference herein and attached hereto as Exhibit A,
13 is adopted and hereby entered as the Board's Final Order Granting
14 Motion to Dismiss herein.

15 DONE at Lacey, Washington, this 28th day of October, 1976.

16 POLLUTION CONTROL HEARINGS BOARD

17 Art Brown
18 ART BROWN, Chairman

19 W. A. Gissberg
20 W. A. GISSBERG, Member

21 Chris Smith
22 CHRIS SMITH, Member

23
24
25
26 FINAL ORDER GRANTING
27 MOTION TO DISMISS

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
IVAN COLE,)
Appellant,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 957
ORDER GRANTING
MOTION TO DISMISS

On September 1, 1976, a Motion for Dismissal for Lack of Subject Matter Jurisdiction was filed by Respondent Department of Ecology (DOE) with the Pollution Control Hearings Board in PCHB No. 957.

By stipulation of the parties this Motion was considered by the Board on the basis of written memoranda submitted in lieu of oral argument.

Having reviewed the pleadings and memoranda submitted by the parties, the Board concludes that Respondent's Motion should be granted.

Appellant agreed in his Memorandum opposing Respondent's Motion

EXHIBIT A

1 that Respondent's factual account (pp. 2-3 of Respondent's Memorandum)
2 was acceptable as the factual basis in this appeal.

3 On these facts and pleadings filed, it appears to the Board that
4 Appellant seeks (1) a vacating of the Order denying Appellant's
5 Ground Water Application No. 9951; (2) a reinstatement of the applications
6 pending status with the initial priority date attaching.

7 It apparently is Appellant's intent that once the application is
8 reinstated, it would be amended to reflect a change in lands to be
9 irrigated from Section 15 to Section 11. RCW 90.03.380 does establish
10 procedures for the transfer of place of use without loss of priority
11 rights.¹ No effort to comply with these procedures, however, during
12 the pendency of the subject application is alleged or apparent from
13 the facts of this matter.

14 Pursuant to RCW 43.21B, the Pollution Control Hearings Board has
15 jurisdiction to review orders issued by the DOE to determine their
16 validity. The Findings of Fact and Order now appealed in PCHB 957
17 was issued on June 25, 1976. The Examiner's Report on which the denial
18 was based states that Certificate No. 6260-A issued to Appellant is
19 appurtenant to the same lands sought to be irrigated under Application
20 No. 9951.

21 On its face, the Order of denial would appear then to have issued
22 on a finding that a granting of the permit would create a duplication
23 of rights which would not be in the public interest pursuant to
24 RCW 90.03.290.

25
26 1. See also WAC 508-12-190(1).

1 Appellant does not challenge the adequacy of the findings or
2 the conclusions based thereon but nonetheless pleads for a vacation
3 of the Order. Appellant has filed three "appeals" in this matter. On
4 December 19, 1975, prior to the issuance of the Order itself, Appellant
5 appealed the administrative "cancellation" of the subject application.
6 This appeal did note that " . . . It is my understanding that that
7 application was in error and should have covered at least a portion of
8 Section 15 and the balance should have been located in Section 11 of
9 the same Township and Range." An amended Notice of Appeal filed
10 January 30, 1976, deleted mention of the possible mistake and limited
11 the grounds to failure to provide notice and opportunity for hearing
12 prior to cancellation. The appeal of July 26, 1976, again challenged
13 the failure to provide applicant with notice prior to issuance of
14 Order of denial on June 25, 1976.

15 Respondent is under no statutory or regulatory duty to provide
16 applicants with notice and opportunity for hearing prior to the
17 Department's denial of an application. An applicant's interests are
18 protected through the provisions of RCW 90.03.290 which requires that
19 the supervisor must make findings relative to the availability of water,
20 the impairment of existing rights, and the interest of the public.
21 Having made such findings and issued an Order accordingly, no
22 procedural irregularity can be found in the action of DOE.

23 The Board concludes that this Board has no jurisdiction to require
24 the DOE to provide notice and opportunity to be heard prior to issuance
25 of its Order of denial and hereby grants Respondent's Motion for

6
27 ORDER GRANTING
MOTION TO DISMISS

1 Dismissal for Lack of Subject Matter Jurisdiction.

2 DATED this 5th day of October, 1976.

3 POLLUTION CONTROL HEARINGS BOARD

4 Art Brown
5 ART BROWN, Chairman

6 W. A. Gissberg
7 W. A. GISSBERG, Member

8 Chris Smith
9 CHRIS SMITH, Member

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27 ORDER GRANTING
MOTION TO DISMISS